

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CACR07-776

February 20, 2008

RONALD SHAMLIN, JR.
APPELLANT

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[CR-04-142-2; CR-05-409-3]

V.

HON. GRISHAM A. PHILLIPS, JR.,
CIRCUIT JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

In April 2006, appellant Ronald Shamlin pled guilty to theft-of-property and multiple drug charges. As part of his guilty plea, he was sentenced to probation. Shamlin's probation conditions required him to pay restitution, fines, and court costs, and to make monthly contact with his probation officer. In October 2006, the State filed a petition to revoke Shamlin's probation on the ground that Shamlin failed to pay restitution, fines, and court costs. At the revocation hearing, evidence of Shamlin's failure to regularly contact his probation officer was introduced. The trial court denied the State's petition to revoke probation based on Shamlin's failure to pay, but it granted the petition based on Shamlin's failure to maintain monthly contact with his probation officer.

For reversal, Shamlin contends that the trial court abused its discretion in revoking his probation based on evidence of probation violations not enumerated in the petition to revoke

and that there was insufficient evidence to support the revocation. Shamlin's first point on appeal is not preserved, and we affirm on his second point.

Shamlin first argues that the trial court abused its discretion in revoking his probation based on evidence of probation violations not enumerated in the State's petition to revoke. It is undisputed that the trial court revoked Shamlin's probation based on evidence of a probation violation that was not alleged in the State's petition. And it is true that a defendant's right to due process requires that he be given notice of the conditions of probation that he was alleged to have violated. *Cheshire v. State*, 80 Ark. App. 327, 95 S.W.3d 820 (2003). However, it is also true that the denial of any right, even a constitutional one, must be objected to at trial to be preserved for appeal. *Id.*

At no time during the revocation hearing did Shamlin object to any of the testimony from any witness about his failure to regularly contact his probation officer. The State offered the testimony of Probation Officers Matt Boyd and Shirley McMurray, both of whom testified—without objection—that Shamlin failed to make regular contact with the probation office. Shamlin's counsel cross-examined these witnesses about Shamlin's lack of contact with the probation office. Shamlin's own testimony was that he was aware of all the conditions of his probation, including his duty to keep in contact with his probation officer. His testimony also included his excuse as to why he did not make monthly contact with his probation officer—because of his various medical conditions. He further testified that he made contact with Officer McMurray over the phone on one occasion, told her about his multiple medical issues, and she told him that he did not have to contact her “until [he] got back on his feet.”

Moreover, Shamlin's counsel, during closing argument, argued that Shamlin did not make regular contact with this probation officers because of his poor health. Again, no objection to the admission of this evidence was lodged. Instead, Shamlin's counsel argued, "[D]id [Shamlin] have an obligation to make telephone contact with the [probation] office? Well, he probably did. He did not follow the textbook letter of making contact with the office."

When an issue is not brought to the attention of the trial court, we do not consider it on appeal because the trial court had no opportunity to rule on the issue. *Cheshire, supra*. Therefore, we do not reach the merits of this argument.

The next point raised by Shamlin is that the evidence is insufficient to support the trial court's finding that Shamlin inexcusably failed to maintain monthly contact with the probation office. To revoke probation, the burden is on the State to prove the violation of a condition of probation by a preponderance of the evidence. *Id.* On appeal, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Id.* Since the determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial court's superior position. *Id.*

The trial court found that Shamlin's failure to pay restitution, fines, and costs was excusable due to his poor medical condition.¹ However, the trial court also found that Shamlin's medical condition was no excuse for failing to maintain contact with his probation

¹The evidence established that Shamlin suffered from diabetes and a blood infection; had a stroke, which required surgery; had hand surgery; and had toes and part of his foot amputated.

officer. The court stated, "...I don't think [your health problems were] an excuse for not calling in." The trial court further stated, "I think that what you have done shows somewhat of a contempt for the system and I was especially concerned about the fact that the probation officers had to scale a fence in order to make contact with you. They could not contact you by telephone. They could not contact you by the normal means of contacting a person who is on probation and you failed to maintain contact with them." Finally, the trial court found that Shamlin's testimony that Officer McMurray told him he did not have to report was not credible.

We hold that the trial court's finding that Shamlin inexcusably failed to maintain contact with his probation officer is not clearly against the preponderance of the evidence. Two probation officers testified that Shamlin failed to make monthly contacts with the probation office despite his duty to do so. Seven months passed with no contact made by Shamlin. Officer Boyd testified that when the officers arrived at Shamlin's residence to arrest him, they had to scale a fence and walk down a long driveway to reach the home because they could not reach Shamlin by phone. While Shamlin's testimony was that he contacted Officer McMurray and she told him that he did not have to contact her again "until [he] got back on his feet," Officer McMurray flatly denied this allegation. The appellate court defers to the trial court's superior position on determinations of credibility. *Cheshire, supra; Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

Affirmed.

GRIFFEN and BAKER, JJ., agree.

